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December 23, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W. Suite TW-A325
Washington, D.C. 20554

RE: In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115

Dear Ms Dortch

Enclosed for filing in the above-referenced docket are the original and one copy of the Washington Utilities and Transportation Commission's Opposition to Verizon's Petition for Reconsideration of the Third Report and Order in CC Docket No. 96-115, which was filed electronically December 23, 2002.

Thank you for your assistance.

Sincerely,

SHANNON E. SMITH
Assistant Attorney General
(360) 664-1192

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Enclosure

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
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Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	
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OPPOSITION OF WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION TO VERIZON'S PETITION FOR RECONSIDERATION OF THIRD REPORT AND ORDER IN CC DOCKET NO. 96-115

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OPPOSITION OF
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
TO VERIZON'S PETITION FOR RECONSIDERATION
OF THIRD REPORT AND ORDER IN CC DOCKET NO. 96-115

The Washinyton Utilities and Transportation Commission (WUTC) opposes the Verizon telephone companies' (Veriron) petition for reconsideration of the Commission's Third Report and Order' on telephone customer privacy protections in the above-captioned proceeding,

I. Introduction

In its Petition, Verizon does not seek change to customer privacy rules adopted by the Commission, and it is offers no evidence that the Commission failed to consider any of the extensive arguments and evidence that Verizon offered during the rule making comment process and in subsequent *ex parte* sessions. Rather, Verizon wants the Commission to reverse an act it did not take, namely the decision *not* to preempt state rules that were *not* even in effect at the time of the Third CPNl Order.

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[1] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' use of Customer Proprietary* **Network** *Information and* **Other** *Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Dockct No. 96-115, FCC 02-214, 17 FCC Rcd 14860 (July 25, 2002) ("Third CPNl Order").

Verizon seeks presumptive preemption – for the Commission to preempt rules that it has never seen and indeed that did not exist at the time Verizon filed its petition. Verizon offers draft rules of Washington and California in support of its plea for preemption, but the existence of tlicse proposals docs not support Verizon's case. Even if the case for preemption of these specific proposals were obvious. which it is not, that still would not justify presumptive preemption of all potential future state rules on telephone customer privacy. So severe a restriction on state efforts to protect consumers within their respective jurisdictions would require Verizon to show that every possible state rule conflicts with the Commission's regime, and Verizon has not made the case for this proposition.

II. Washington's CPNI Rule

The Verizon petition refers to and includes a proposed rule that the WUTC issued in April 2002.[2] This proposal ultimately was not adopted by the WUTC. The nile adopted by the WUTC on November 7, 2002,[3] is included in Appendix **A** to this filing. Because Verizon's request rests on the proposition that *every* potential state rule should be preempted, the WUTC will limit its discussion to the Washington rule as it was adopted.

The WUTC rule, like the privacy rule adopted by the Commission, applies different levels of protection to different types of customer information and different uses of that information. In most respects the two sets of rules arc the same, but there are three key differences:

(1) The WUTC rule applies greater protection (opt-in rather than opt-out) to the detailed transaction information that shows to whom, when, and where a customer places

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[2] Verizon Petition, at 4-5.

[3] The WUTC's nile will take effect on January 1, 3003

telephone calls, even when that information is used by the telecommunications company and its affiliates;

(2) The WUTC rule applies greater protection (opt-in rather than opt-out) when customer proprietary network information is sold or otherwise provided to unaffiliated "contractor and joint venture partners;" and

(3) The WUTC rule includes more specific requirements on the notice and approval process itself.

The reasoning behind our rules is expressed in the adoption order, which is also in Appendix **A.**

In drafting the rules, the WUTC sought to minimize the differences between the rules that apply to Washington state customers and the national rules, and indeed the changes from our April proposal to our November final decision reflect that effort However, in balancing the interests of telecommunications companies and their customers, the W UTC found that the greater use of opt-in approval was appropriate in the state of Washington.

In making this decision, the WUTC considered the arguments of the telecommunications companies that do business in Washington regarding their ability to conduct business here under a more protective privacy regime. The WUTC also explicitly considered and gave considerable weight to the Commission's expressed concern that it would not "take lightly the potential impact that varying state regulations could have on carriers' ability to operate on a multi-stale or nationwide basis.'" Finally, the WUTC recognized and accepted that it would be responsible,

[4] Third CPNl Order, ¶ 71

based on its own record, to defend the rules from any court challenges that the telecommunications companies might bring.'

The additional protections in the WUTC nile are well-supported by the record in the WUTC rulemaking proceeding. This is true for two fundamental reasons. First, the WUTC record includes substantial involvement by telephone consumers. In telephonic comments, e-mail messages, and comments at public meetings, consumers firmly expressed their concerns about the use of private information by the telecommunications companies that are the conduit of that information. In particular, consumers objcctcd to the use of detailed call information for any purpose outside the call itself and the related business transaction, and they objected to the sale or disclosure of that information to unrelated entities.

Second, the WUTC record includes an actual application of the opt-out approach that the WUTC round to he grossly inadequate. Brictly, in December 2001 Washington State's largest local exchange conipany, Qwest Corporation (Qwest), distributed opt-out notices as a bill insert The notices were incomprehensible to most people. Moreover. those customers who came to understand the notices – often duc to news media reports rather than the notice itself – found that the opt-out mechanisms established by Qwest did not work. Qwcst was proposing to use customers' private information unless it heard an objection. yet there was no practical way for the customer to object. The WUTC found that this experience with the real-world problems of an opt-out method provided support both for a more restricted reliance on the opt-out method and its presumption of consent and for a more specific and extensive set of requirements on the notice and approval process itself.

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[2] Three weeks after the WUTC adopted its rule, Verizon filed a complaint in U.S. District Court in Seattle seeking to enjoin its enforcement. ***See*** *Verizon Northwest, Inc.* ***et*** *al* ***v.*** *Showalter, et al.*, No. CV02-2342R (W.D.Wash., tiled Nov. 21, 2002).

It is noteworthy that during the public outrage about Qwest's actions Verizon did not avail itself of the opportunity to provide the countervailing example to Qwest. Verizon is Washington State's second-largest local exchange company, and it also was planning to issue opt-out notices to its Washington customers in late 2001. Verizon could have attempted to demonstrate to the WUTC that the Qwest experience was an anomaly and that a carrier could distribute an opt-out notice that would be useful and informative to customers. Instead Verizon chose to wait, perhaps in the hopes that it could issue an opt-out notice later after the media spotlight was shining elsewhere

III. State Measures to Protect Telephone Customer Privacy Will Not Negate the Commission's Authority

Verizon contends that the FCC must preempt state CPNI regulations because the failure to do so would negate the FCC's duty to implement national rules and would violate the First Amendment. Verizon's arguments ignore the states' traditional role in protecting the interests of consumers and presume that state CPNI regulations will violate the First Amendment.[6]

A. There Is a Need for State Protections of CPNI

Implicit in Verizon' argument is the contention that state protections of telephone customer privacy are unnecessary and improper in light of the Commission's national CPNI rules. However, there is room for and a need for state protections of telephone customer privacy. As the Commission well understands, state regulators have a duty to protect customers in their respective states.[7] This involves a close and comprehensive exercise of state police powers to oversee the business relationship between the regulated telecommunications company and its

[6] Verizon Petition, at 7-12.

[7] Third CPNI Order, ¶ 71 ("[O]ur state counterparts . . . bring particular expertise to the table regarding competitive conditions and consumer protection issues in their jurisdictions, and privacy regulation, as part of general consumer protection, is not a uniquely federal matter.").

customers. This oversight necessarily includes issues regarding the use of the private information about a customer that is a by-product of this business relationship, and state rules governing telephone customer privacy serve that purpose

B. Failing to Presumptively Preempt Srate CPNl Regulations Does Not Violate the First Amendment

Vcrizon argues that tlie Commission's failure to presumptively preempt state telephone customer privacy protections violates the First Amendment.[8] In fact. Verizon goes so far as to say "no state record can bc compiled that will satisfy the First Amendment."[9] The Commission should reject Verizon's invitation to preempt summarily all state CPNI statutes or regulations without so much as reviewing them.

1 *Opt-out is not the only customer notice mechanism that will satisfy the First Amendment*

Conrrary Lo the statements Verizon makes in its petition, the Commission has not acknowledged that there is no substantial government interest in protecting intra-company disclosures of CPNI.[10] To tlie contrary, the Commission determined that the government has a substantial interest in ensuring that customers have the opportunity to approve or disapprove uses of their CPNI." With respect to intra-company uses of CPNI, the Commission concluded that its previous opt-in rule could not he justified based on the record before it.[12] The Commission then

[8] Verizon Petition, at 12-13.

[9] *Id.* at 13.

[10] *See id.* at 14.

[11] Third CPNI Order, ¶ 31

[12] *Id.*

determined that opt-out satisfies ihc First Amendment." However. the Commission did not state that it would bc impossiblc for an opt-in rule to pass First Aniendment muster

Verizon also misstates the holding of the Tenth Circuit regarding the constitutionality of opt-in notice requirements. The Tenth Circuit did not hold that opt-in violates the First Amendment, rather that court held that the Commission bad not sufficiently justified its choice of opt-in.[14] Therefore, consistent with the Tenth Circuit's decision, the Commission properly affords state commissions an opportunity to develop a record that would support an opt-in notice requirement for intra-company CPNI.[15]

2. *States may show that opt-in serves a substantial state interest and that it is no more extensive than necessary to protect the government* **interest.** *The Commission will not violate the First Amendment by* **failing** *to preempt those efforts.*

Rather than consider preempting state CPNI regulations on a case-by-case basis, Verizon asks the Commission to prejudge all state telephone customer privacy protections and hold that the records upon which they are based do not demonstrate a substantial state interest in requiring opt-in customer notice or that opt-in is no more extensive than necessary to protect the government interest.[16] The Commission should decline to do so

As set forth above and acknowledged by the Coinmission, states have an interest in protecting the privacy of their citizens. Some states have statutory or constitutional provisions that may compel greater protection of individual privacy than that afforded by the Commission's

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[13] *Id.*

[14] *US West, Inc. v. FCC*, 182 F.3d 1224, 1240 & n.15 (10th Cir. 1999), *cert. denied* 530 U.S. 1213 (2000).

[15] Third CPNI Order, ¶ 71

[16] *See* Verizon Petition, ai 14-18,

CPNI rules." The Commission should not preempt the states' efforts to respond to the concerns of their citizens or implement their particular state laws. Rather, the Commission should preserve its balanced approach of considering preemption on a case-by-case basis.

The Commission will not violate the First Amendment simply by permitting states to consider opt-in customer notice rules.[18] Rather, states adopting opt-in rules have the burden to defend those rulcs against First Amendment challenges. In fact, the WUTC presently is defending a lawsuit brought by Verizon against the CPNI rules it adopted on Noveniber 7, 2002. in which Verizon has requested a preliminary injunction and a temporary restraining order against implementation of the WUTC's CPNI rules."' On December 20, 2002, the District Court determined that it would not rule on Verizon's request for preliminary injunction until the state has tlie opportunity to depose Verizon's witness Maura Breen, who had testified that the WUTC's CPNI rules would be damaging to the company. The Court also denied Verizon's request for a temporary restraining order. Thus, the Court saw no need to strike down the WUTC's rules without first conducting a thorough review.

Vcriron's challenge to the WUTC's rules in federal District Court shows that it is unnecessary for the Commission to presumptively preempt state telephone customer privacy protections. By challenging thc rules in court, Verizon has availed itself of an adequate remedy for rules that it alleges violate its First Amendment rights.

"Third CPNI Order, ¶ 71 & n.164.

[18] *See* Verizon Petition, at 20-22.

[19] *See supra. n.5.*

3. *By considering preemption on a case-bycue basis. the Commission does not interpret Section 222 in an unconstitutional manner*

In the same vein as the arguments stated above, Verizon contends that the Commission cannot allow states to consider opt-in regulations because to do so would be construing Section 222 in a way that renders the statute unconstitutional.[20] However, nothing about allowing states to consider opt-in rules renders Section *222* unconstitutional. Notwithstanding Section 222, states may have authority to implenient opt-in *requirements*. If states were to adopt such opt-in requirements, it would be those statutes or regulations -- not Section 222 – that would be at issue.

IC. Verizon's Request for Reconsideration Based on Alleged Difficulties in Complying With "Inconsistent" State Regulations Is Improper Under 47 C.F.R. § 1.429(b)

Verizon argues that the Commission should presumptively preempt state telephone customer privacy protcctions that are more restrictive than the Commission's CPNI rules because the different rules would make it more difficult for carriers to markct their services to customers." The Coniniission should rcjcct this argument because the possibility of differing state regulations was well-known to Verizon during the Commissions rulemaking proceeding. Under the Commission's procedural rules, Verizon is not entitled to reconsideration based on facts that were known to it while the proceeding was pending. 47 C.F.R.§ 1.429(b)(2). Verizon had informed the Commission that inconsistent stale requirements may be difficult for carriers to administer and could liavc presented the information contained in the Declaration of Maura Breen at that time.[22] The information contained in the Declaration of Maura Breen is

[20] Verizon Petition, ai 19-20.

[21] *See* Verizon Petition, at 9-12 & Appendix E (Breen Decl.).

[22] CC Docket No. 96-1 15, Verizon Feb. 20, 2002 *Ex Parte* Letter, Attach. at 4

information that Verizon had the opportunity to present to the Commission at an earlier date.[23] Verizon attached to its Petition the WUTC's proposed CPNI rules that were issued in April 2002, and could have informed the Commission at that time regarding its concerns about the WUTC's proposed rules." In addition, different state consumer and privacy protections are a fact of doing business on a national level and telecommunications companies will remain subject to potentially different state requirements.

V. Conclusion

The Commission made the right decision in adopting a case-by-case approach to reviewing potential conflicts in state privacy rules. All the arguments that Verizon makes in its petition were before the Commission when it issued the Third CPNI Order, and the Commission should not reconsider this decision regarding preemption.

Respectfully submitted.

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[23] Other parties had availed themselves of the opportunity to present their views regarding preemption of more restrictive state CPNI regulations. *See, e.g.*, Docket No. 96-115, Montana PUC Feb. 22, 2002, Letter; National Association of State Utility Consumer Advocates April 12, 2002 *Ex Parte* Comments; Qwest May 30, 2002 *Ex Parte* Letter.

[24] Ultimately, the WUTC did not adopt the rules proposed in April 2002. *See supra* text accompanying nn. 2-3.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Washington Utilities and Transportation Commission's Opposition to Verizon's Petition for Reconsideration of the Third Report and Order in CC Dockct No. 96-115, upon the persons and entities listed on the Service List below by depositing a copy of said documeni in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at Olympia, Washington this 23rd day December, 2002.

KRISTA L. LINLEY

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Adopting and Repealing:	)	DOCKET NO. UT-990146
WAC 480-120-201 through WAC 480-120-209 and WAC 480-120-211 through WAC 480-120-216	)	GENERAL ORDER NO. R-505
Relating to Telecommunications Companies - Customer Information Rules.	)	ORDER ADOPTING AND REPEALING RULES PERMANENTLY

1 **SYNOPSIS:** *The Commission adopts rules governing how telecommunications companies may use information they possess about the telecommunications services a particular customer uses and how the customer uses them. The rules follow the framework of corresponding rules recently adopted by the Federal Communications Commission, but contain three important differences:*

- *The rules provide increased protection for particularly sensitive personal information, including the phone numbers a customer calls and including highly specific phone calling habits of the customer. A company may not use this information, known as "call detail," without the customer's express ("opt-in") approval, except as necessary for the company to provide service or as required by law.*

- *We narrow the scope of a telecommunications company's "family" of affiliated companies, within which it may share information about a customer if the customer does not "opt-out." The effect is to require express ("opt-in") approval for disclosure to more types of entities than the federal rules require.*

- *We improve the notice that companies must provide to customers, in order to help customers understand what is at stake. Also, by requiring companies to offer their customers more convenient methods for opting-out, we enhance customers' ability to exercise that choice, where applicable.*

In reaching these conclusions, the Commission balances protected rights of telecommunications companies to engage in commercial free speech, with customers' rights to privacy and free speech and association, as reflected in our state and federal laws and constitutions. We have adopted rules that we think appropriately balance these interests under the law.

2 **STATUTORY OR OTHER AUTHORITY:** The Washington Utilities and Transportation Commission takes this action under Notice WSR # 02-08-081, filed with the Code Reviser on April 3, 2002. The Commission brings this proceeding pursuant to RCW 80.01.040 and RCW 80.04.160.

3 **STATEMENT OF COMPLIANCE:** This proceeding complies with the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 43.21C RCW), and the Regulatory Fairness Act (chaprer 19.85 RCW).

4 **DATE OF ADOPTION:** The Commission adopts these rules on the date that this Order is entered.

5 **CONCISE STATEMENT OF PURPOSE** AND **EFFECT OF THE RULE:** RCW 34.05.325 requires that the Commission prepare and provide to commenters a concise explanatory statement about an adopted rule. The statement must include the identification of the reasons for adopting the rule, a summary of the comments received regarding the proposed rule, and responses reflecting the Commission's consideration of the comments. The Commission often includes a discussion of these matters in its rule adoption orders.

6 In this rulemaking, in order to avoid unnecessary duplication, the Commission designates the discussion in this order, including its attachments (appendices A and B), as its concise explanatory sratement.

7 **REFERENCE TO AFFECTED RULES:** This ordcr repeals the following sections of the Washington Administrative Code:

WAC 480-120-144	Use of privacy listings for telephone solicitation.
WAC 480-120-151	Telecommunications carriers' use of customer proprietary network information (CPNI).

WAC 480-120-152	Notice and approval required for use of customer proprietary network information (CPNI).
K'AC 480- 20-153	Safeguards required for use of customer proprictan network information (CPNI).
WAC 480- 20-154	Definitions.

8 This Order adopts the following sections of the Washington Administrative Code:

WAC 480- 120-201	Definitions.
WAC 480-120-203	Use of customer proprietary ncnvork information (CPNI) not permitted to identify or track customer calls to competing service providers.
WAC 480-120-204	Opt-in approval required for use, disclosure, or access to customer ICPNI.
WAC 480-120-205	Using customer proprietary network information (CPNI) in the provision of services.
WAC 480-120-206	Using individual customer proprietary network information (CPNI) during inbound and outbound telemarketing calls.
WAC 480- 20-207	Use of privare account information (PAI) by company or associated companies requires opt-out approval
WAC 480- 20-208	Use of customers' private account information (PAI) to markct company products and services without customer approval
WAC 480-120-209	Notice when use of private accounr information (PAI) is pcrmittcd unless a customer directs otherwise ("opt-out").
WAC 480-120-211	Mechanisms for opting out of use of private customer account information (PAI).
WAC 480-120-212	Notice when express ("opt-in'? approval is required and mechanisms for express approval

WAC 480-120-213	Confirming changes in customer approval status.
WAC 480- 20-214	Duration of customer approval or disapproval.
WAC 480- 20-215	Safeguards required for CPNI.
WAC 480- 20-216	Disclosing CPNI on request of customer.
WAC 480- 20-217	Using privacy listings for telephone solicitation.
WAC 480-120-218	Using subscriber list information for purposes other than directory publishing.
WAC 480-120-219	Severability.

9 This Order withdraws the following proposed section of the Washington Administrative Code:

WAC 480-120-202	Use of cusromer proprietary network information (CPNT) permitted.

10 **PREPROPOSAL STATEMENT OF INQUIRY** AND **ACTIONS THEREUNDER** The Commission filed a Preproposal Statement of Inquiry (CR-101) on April 15, 1999, at WSR # 99-09-027.

11 **ADDITIONAL NOTICE** AND **ACTMTY PURSUANT TO PREPROPOSAL STATEMENT:** The statement advised interested persons that the Commission was considering a rulemaking to review rules relating to regulated telephone companies for content and readability pursuant to Executive Order 97-02, with attention to the rules' need, effectiveness and efficiency, clarity, intent, and statutory authority, coordination, cost, and fairness. The statement also advised that the review would include consideration of whether substantive changes or additional rules are required for telecommunications regulation generally, in concert with the Federal Telecommunications Act of 1996 and potential actions by the Washington Legislature during its 1999 session. The Commission also provided notice of the subject and the CR-101 to all persons on the Commission's list of persons requesting such information pursuant to RCW 34.05.320(3), and sent notice to all registered telecommunications companies and to the Commission's list of telecommunications attorneys. The Commission posted the relevant rulemaking information on its internet web site at www.wutc.wa.gov.

12 **MEETINGS *AND* WORKSHOPS; ORAL COMMENTS:** The Commission held several rulemaking workshops on draft rules in Docket No. UT-990146 concerning Chapter 480-120 WAC. At a workshop held on June 5, 6, and 7, 2001, WAC 480-120-144, "Use of privacy listings for telephone solicitation," was included on the agenda. That rule has been amended and adopted as WAC 480-120-217.

13 On January 23 and 24,2002, the Commission held evening public meetings on the topic of privacy of customer telephone records. The meeting on January 23 was held in Bothell, Washington, and the January 24 meeting was held in Fife, Washington. The times and locations of the meetings were widely reported in the press in advance, both meetings were attended by members of the public, and both were reported on by the media.

14 The Commission held a special open meeting on February 5,2002, for the purpose of considering adoption of an emergency rule on the topic of customer privacy. At the beginning of the meeting, the Commission informed attendees that it would not be taking action on an emergency rule, but invited participation in a discussion of the topic. Representatives of several large telecommunications companies spoke on the topic.

15 On March 14 and March 22, 2002, the Commission held half-day rulemaking workshops on issues related to customer privacy rules. These workshops were attended by representatives of a diverse interests, including telecommunications companies, public interest organizations, state agencies, and Public Counsel.

16 **NOTICE OF PROPOSED RULEMAKING:** The Commission filed a notice of Proposed Rulemaking (CR-102) on April 3,2002, at WSR #02-08-081. The Commission scheduled this matter for oral comment and adoption under Notice WSR #02-08-081 at 9:30 a.m., Friday, July 26, 2002, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. The Notice provided interested persons the opportunity to submit written comments to the Commission.

17 **COMMENTERS (WRITTEN COMMENTS):** The Commission received written comments from AARP, AT&T, Allegiance Telecom, Claudia Berry,

Elizabeth Clawson, Rep. Mary Lou Dickerson, Electronic Privacy Information Center (EPIC), Elizabeth Fehrenbach, Emeri Hansen, Gail Love, Low Income Telecommunications Project (LITE), Lindsay Olsen, Public Counsel Section of the Office of the Attorney General, Qwest, Senior Services, Sprint, Robert Stein, Matilda Stubbs, Destinee Sutton, Ben Unger, Verizon, WashPIRG, Washington Independent Telephone Association (WITA), and WorldCom.

18 **RULEMAKTNG HEARING:** The Commission originally scheduled this matter for oral comment and adoption under notice #02-08-081, at a rulemaking hearing scheduled during the Commission's regularly scheduled open public meeting on July 26,2002, at the Commission's offices in Olympia, Washington. The Commission continued the rule adoption on the record of the July 26 hearing and by written notice to stakeholders who had participated in earlier phases of the rulemaking proceeding until August 20,2002. On August 20, 2002, Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, and Commissioner Patrick J. Oshie considered the rule proposal for adoption. The Commission heard oral comments from Qwest, Public Counsel Section of the Office of the Attorney General, Qwest, Seattle Telecommunications Consortium, Spokane Neighborhoods Action Program, Sprint, Verizon, WashPIRG, and WorldCom.

19 **COMMISSION ACTION** After considering all of the information regarding this proposal, the Commission repealed and adopted the rules in the CR-102 at WSR #02-08-081 with the changes described in Appendix B.

20 **STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE** In reviewing the entire record, the Commission determines that WAC sections 480-120-144, 480-120-151, 480-120-152, 480-120-153, 480-120-154 should be repealed.

21 The Commission determines that WAC sections 480-120-201, 480-120-203, 480-120-204, 480-120-205, 480-120-206, 480-120-207, 480-120-208, 480-120-209, 480-120-211, 480-120-212, 480-120-213, 480-120-214, 480-120-215, 480-120-216 should be adopted to read as set forth in Appendix C, as rules of the Washington Utilities and Transportation Commission, to take effect pursuant to RCW 34.05.380(2) on January 1, 2003.

COMMISSION ORDER

I. BACKGROUND

A. Prior WUTC Rules Addressing Telecommunications Company Use of Non-Public Personal Information

22 This Commission adoprcd its first rule to protcer the privacy o f customer proprietary ncnvork information (CPNI)[1] in 1997.[2] That rule prohibited the use of CPNI for marketing purposes. In early 1999, we replaced thar rule with rules[3] substantively identical to those adopted by rhc Fcdcral Communications Commission (FCC) in 1998.[4] The FCC rules implemented § 222 ("Sccuon 222")[5] of the Federal Telecommunications Act of 1996 (the "1996 Act"). The FCC rules required carriers to obtain a customer's express approval (or "opt-in") before using or disclosing CPNI identifiable with that customer, for any purpose other than marketing additional communications services within the category of services to which the customer already subscribed. The "categories of service" defined by the rule uerc local, interexchange, and wireless.

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[1] Under 41 U.S.C § 222. customer proprietary network information means: "information that relates to the quantity, technical configuration. type, destination, location. and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship: and information contained in the bills of pertaining to telephone exchange service or telephone toll service received by a customer of a carrier . . "

[2] *97-18-056 Wash. St. Reg.. § 480-120-139(5) (General Order No. R-442. Docker No UT-960942) filed August 27, 1997.*

[3] *99-05-015 Wash.* St. *Rep.. § 480-120-151 et seq. (General Order No. R-459. Docket No. UT-971514) filed February 25, 1999.*

[4] *In the Matter of Implementation of Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Nerwork Information ond Other Cusromer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Acr of 1934, as amended. CC Docker Nos. 96-115 and 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1988).*

[5] Section 222(c)(1) of the 1996 Act provides: "PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.–Exceptas required by law or with the approval of the cuslomer. a telecommunications carrier thar receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use. disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service fromwhich such information is derived, or (B) services necessary to. or used in, the provision of such telecommunications service, including the publishing of directories."

B. 10th Circuit Vacation of 1998 FCC Rules

23 The 10th Circuit U.S. Court of Appeals in *U.S. West v. F.C.C.*, 182 F.3d 1224 (10th Cir. 1999) vacated the portion of the FCC's CPNI rules that required customer opt-in, as an unjustified restriction on carriers' First Amendment commercial speech rights. The 10th circuit said that the FCC had failed to show that an alternative less restrictive of carriers' free speech rights, such as opt-out, would not sufficiently protect customer privacy. The US. Supreme Court declined to review the 10th Circuit decision.[6]

24 In response to the 10th Circuit decision, the FCC, in August 2001, issued an order reinterpreting its rules as requiring that customers need only be afforded the ability to "opt-out" of carriers' "use, disclosure or permission of access" to CPNI.[7] At the same time, the FCC initiated a new rulemaking on the topic of CPNI.

25 After the FCC's decision to reinterpret its rule in response to the 10th Circuit's *U.S. West* decision, Verizon asked the WUTC either to eliminate our state rules or to conform them to the new FCC interpretation. We first considered adopting substantive changes to our CPNI rules as a result of Verizon's request.

26 Following Verizon's request, Qwest mailed an opt-out notice to its customers that touched off alarm and angry reaction among consumers, consumer and privacy rights advocates, and the media. Rased on intensely negative public response to its notice and its limited ability to accommodate customer requests to retain their privacy, Qwest retracted its notice. The Qwest experience served to highlight for the Commission the shortcomings of the implied consent or opt-out method of obtaining customer approval with respect to certain uses and certain types of CPNI.

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[6] *Petition for cert. denied. Competition Policy Institute v. US WEST, Inc., 530 U.S. 1213 (June 2000).*

[7] *In the Matter of Implementation of Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Cusromcr Informarion ond Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934. as amended, CC Docker Nos. 96-115, 96-149, and 00-257, Clarification Order and Second Further Notice of Proposed Rulemaking. 16 FCC Rcd 16506 (August 28. 2001).*

C. New FCC Rule

27 In July of this year, the FCC adopted a new set of rules interpreting the requirements of § 222 of the Federal Telecommunications Act (Section 222), the statute on which the FCC's rules are based.[8] In its adoption order, the FCC expressly left the door open to more stringent state protection for CPNI.[9] It also stated, however, that it would be willing to preempt state rules that needlessly depart from national standards. Under the FCC's rules, *47 CFR Part 64*

- Use of CPNI that is not identified with an individual is not restricted by the rules.

- Without providing any notice to the customer or securing the customer's permission to do so, carriers may use a customer's individually identifiable CPNI to market telecommunications services within the category of service which the carrier already provides to that customer.

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[8] *In the Matter of Implementation of Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended. 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers. Third Report and Order and Third Further Notice of Proposed Rulemaking (Released: July 25, 2002).*

[9] *Id. at ¶¶ 69-74.* The *FCC* stated:

"We conclude that carriers can use opt-out for their own marketing of communications-related services, as described above, which is less burdensome than opt-in. We reach this conclusion based on the record before us, but must acknowledge that states may develop different records should they choose to examine the use of CPNI for intrastate services. They may find further evidence of harm, or less evidence of burden on protected speech interests. Accordingly, applying the same standards, they may nevertheless find that more stringent approval requirements survive constitutional scrutiny, and thus adopt requirements that 'go beyond those adopted by the Commission.' While the Commission might still decide that such requirements could be preempted, it would not be appropriate for us to apply an automatic presumption that they will be preempted. We do not take lightly the potential impact that varying state regulations could have on carriers' ability to operate on a multi-state or nationwide basis. Nevertheless, our state counterparts do bring particular expertise to the table regarding competitive conditions and consumer protection issues in their jurisdictions, and privacy regulation, as part of general consumer protection, is not a uniquely federal matter. We decline, therefore, to apply any presumption that we will necessarily preempt more restrictive requirements.

. . .

We note that we would be willing to preempt state requirements in the event that numerous different approval schemes make it impracticable for carriers to obtain customer approval for the use of CPNI. Carriers can always establish that burdens from state and federal CPNI regulation are unworkable. By reviewing requests for preemption on a case-by-case basis, we will be able to make preemption decisions based on the factual circumstances as they exist at the time and on a full and complete record."

The categories of service are local, interexchange, and wireless. Included within the local service category, in addition to basic local service, are services such as speed dialing, computer-provided directory assistance, call monitoring, call tracing, call blocking, call return, repeat dialing, call tracking, call waiting, caller I.D., call forwarding, and certain centrex features.

- Only after providing the customer with notice and an opportunity to opt-our may carriers use a customer's individually identifiable CPNI to market communications-related services outside of the category to which the customer already subscribes. The carrier may also disclose the customer's individually identifiable CPNI to its affiliates, agents, independent contractors and joint venture partners for the purpose of marketing communications-related services subject to the customer's right to opt-out of such dsclosure. The carrier must enter into confidentiality agreements with its independent contractors and joint venture partners that prohibit additional use or dissemination of the individually identifiable CPNI by the contractor or joint venture partner.

- Carriers must obtain a customer's express, opt-in approval to disclose a customer's individually identifiable CPNI to third parties or to use it to market non-communications-related services or goods.

D. Our Overall Approach

28 Stakeholders have alternatively urged us to adopt across-the-board opt-in and across-the-board opt-out requirements for telecommunications companies' use of customer information. Others have urged us to defer completely to the rules adopted by the FCC, either by not adopting any rules or by adopting rules identical to the FCC's.

29 We reject the suggestion that we adopt without change all of the FCC rules. We consider a record different from the FCC's. We consider state as well as federal law in our decisions. Washington state stakeholders expressed to us views that were different from those heard by the FCC. And—perhaps because we are closer to our customers than is the FCC—we weigh factors differently from the balance implicit in the FCC rules. Like the FCC, we adopt a combination of opt-in and opt-out protections. Our rules, however, require

express (opt-in) approval from customers in more circumstances than do rhc FCC's rules. We adopt these additional protections based on the extensive record in this docker, and on our considcrarion of federal as well as state law.[10]

30 The sources of our authority to make rules on this subject arc RCLV 80.01.040(3) and RCW 80.36.140, which authorize us to regulate, in the public interest, the practices of telecommunications companies on a broad range of matters. Unlike the FCC, we are not bound by the 10th Circuit's decision. We nonetheless acknowledge the importance of taking care that our regulations do not unnecessarily restrict companies' protcctcd commercial speech with their customers.

31 Qwest, Verizon, Sprint, and others, have presented arguments that they arc entitled, in the exercise of commercial free speech protected by the Constitution, to use information in their possession about their customers to communicate with their customers or others, i.e., to solicit buyers for the services rhat they provide. In order to address these commercial free speech arguments, we have used the same analytical framework the FCC used in its August 2002 rule adoption order. Thar analysis is derircd from the U.S. Supreme Court's *Central Hudson*[11] decision.

32 We assume, for the purpose of designing our rules, that a telecommunicarions company has an interest, protected by the First Amendment, in proposing lawful commercial transactions to its customers, in a non-misleading manner, on the basis of its knowledge about services to which those customers already subscribe from the company. At the same time, we are mindful of customers' interests in their privacy, in their free speech rights, and in their right to associate freely with others. These interests, *too,* are protected by our state and federal constitutions and underlie the state and federal laws we consider here.

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[10] *47 U.S.C. § 222; U.S. Const. Amend. 1; U.S. West v. F.C.C., 182 F.3d 1224 (10th Cir. 1999);* RCW *80.01.040;* ch. Y.73 *RCW; Wash. Const. Arr. 1, §§ 5, 7; In the Matter of Implementation of Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and* Other *Customer Information* and *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Arr of 1934, As Amended. 2000 Biennial Regulatory Review – Review of Policies* and *Rules Concerning Unauthorized Changes of Consumers'* Long *Distance* Carriers, *Third Report and* Order *ond Third Further Notice of Proposed Rulemaking (Released July 25, 2002).*

[11] *Central Hudson* Gas *& Elec. Corp. v. Public Service Comm'n of N Y.*, 447 U.S. 557, 564-65 (1980)(setting out the rest to be applied in determining whether restrictions on commercial speech survive "intermediate scrutiny") .